BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TYLER KENT HOCKENBURY Claimant	)	
VS.	)	
LABOR READY, INC. Respondent	)	Docket No. 1,032,262
AND	)	
INSURANCE CO. OF THE STATE OF PENNSYLVANIA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the March 12, 2010, Award Upon Review and Modification entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on June 2, 2010. Frank D. Taff, of Topeka, Kansas, appeared for claimant. Ryan D. Weltz, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that as of the date of the review and modification hearing, claimant had lost his job and, consequently, had a 100 percent wage loss. The ALJ also found that claimant had a 27.5 percent task loss. Accordingly, the ALJ modified the original Award to find that claimant had a 63.75 percent work disability.

The Board has considered the record and adopted the stipulations listed in the original Award of May 19, 2009, and in the March 12, 2010, Award Upon Review and Modification.

ISSUES

In the original Award, the ALJ found that claimant had not engaged in a good-faith effort to find post-injury employment and, therefore, imputed wages to claimant that were

more than 90 percent of his preinjury average weekly wage (AWW). Accordingly, the ALJ found that claimant's permanent partial disability was limited to his percentage of functional impairment and he was not entitled to an award for work disability. Respondent denies that claimant is entitled to review and modification of the Award because he did not perfect an appeal of that adverse finding and cannot now request a change from functional impairment to work disability. Respondent argues that a "workers compensation modification proceeding does not offer a second opportunity to determine issues decided in the original award," quoting *Scheidt*.[1]

Claimant is unemployed and, therefore, has an actual 100 percent wage loss, and his functional impairment and task loss have remained the same as at the time of the original Award, by stipulation of the parties. Claimant argues that his wage loss has changed from the time when the record closed during the trial of the original Award and that this change of circumstances entitles him to review and modification of the original Award. Claimant, therefore, asks the Board to affirm the ALJ's Award Upon Review and Modification.

The issue for the Board's review is: Has there been a change of circumstances such that claimant is entitled to review and modification of the May 19, 2009, Award?

FINDINGS OF FACT

On November 20, 2006, claimant was employed by respondent as a day laborer. He was working at Allied Construction in Junction City, Kansas, when he suffered injuries to his right shoulder and low back. He continued to work for respondent after his injury and said he worked until about June 2007, although records from respondent indicate claimant received his last paycheck on January 30, 2008. At the time of the February 9, 2009, regular hearing, he was unemployed. However, on March 24, 2009, he told Steve Benjamin, a vocational rehabilitation counselor, that he would be starting a job painting cars during the week of March 30, 2009. He said he would work 40 hours per week with some overtime and would earn $6 per hour. Mr. Benjamin testified that claimant was capable of earning between $262 and $320 per week.

The evidentiary record closed on May 8, 2009, and the ALJ entered an Award in this claim on May 19, 2009. In that Award, he found that claimant's preinjury AWW was $222.74. He awarded claimant a functional impairment of 10 percent to the body as a whole. The ALJ also found that claimant failed to exercise good faith in attempting to find post-injury employment and imputed a wage of $262 to $320 per week to claimant, based on the testimony of Mr. Benjamin. Accordingly, the ALJ found that claimant was disqualified from receiving a work disability and was limited to an award for his functional disability. The ALJ's May 19, 2009, Award was not appealed to the Board.

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[1] *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, Syl. ¶ 2, 211 P.3d 175 (2009).

On September 17, 2009, claimant filed an Application for Review and Modification, claiming his work disability had increased. At the review and modification hearing, claimant testified that the job he told Mr. Benjamin that he would start the week of March 30 lasted only about two weeks, until around the middle of May 2009.[2] Claimant said the business he worked at closed and the owner left. Claimant also testified that he had surgery on his back on either May 28 or 29, 2009, and was unable to work about six weeks. He was released by the surgeon in June 2009. He has not worked since mid-May 2009 when he lost his job painting cars.

The parties have stipulated that claimant's functional impairment and physical limitations remain the same as they were when the original Award was entered. In the Award Upon Review and Modification, the ALJ found that claimant had a 27.5 percent task loss, which was the average of the task loss opinion of Drs. Bieri and Pratt.

PRINCIPLES OF LAW

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. K.S.A. 44-528(a) provides:

> Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.[3] If there is a change in the claimant's work disability, then the award is subject to review and modification.[4]

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[2] Claimant said he did not tell Mr. Benjamin he would begin his new employment during the week of March 30, 2009, but that he would be starting in May 2009. RMH Trans. at 11.

[3] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

[4] *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.[5] Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.[6]

K.S.A. 44-510e(a) states in part:

> If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66 2/3% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and

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[5] *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

[6] *See*, *e.g.*, *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

> if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

In *Bergstrom*,[7] the Kansas Supreme Court held that there is no requirement under K.S.A. 44-510e that an employee make a good faith effort to retain or seek post injury employment.

In *Hayes*,[8] the Kansas Supreme Court stated: "Generally speaking, the same legal principles control a case which arises from a review and modification that apply to an original hearing in a compensation case."

The Board has held that the definition of permanent partial disability set forth in K.S.A. 44-510e applies to post award proceedings for review and modification under K.S.A. 44-528.[9]

For a general body disability, the payment of permanent partial disability compensation ends 415 weeks after the date of accident.[10]

ANALYSIS

At the time the record in the original proceeding closed, claimant was unemployed but anticipating starting a new job in the near future. Nevertheless, the ALJ's Award was based upon a finding of fact that claimant was unemployed. The Award sets out:

> The claimant is also alleging work disability. Claimant apparently quit the employer in January of 2008 because he was driving other employees to work and Mr. Hockenbury was directed to cease doing so by his court appointed guardian.

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[7] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 3, 214 P.3d 676 (2009).

[8] *Hayes v. Garvey Drilling Co.*, 188 Kan. 179, Syl. ¶ 4, 360 P.2d 889 (1961).

[9] *Ramey v. Cessna Aircraft Co.*, Docket No. 5,018,001, Board decision filed August 11, 2010; *Serratos v. Cessna Aircraft Co.*, Docket No. 1,024,584, 2010 WL 1445593 (Kan. WCAB Mar. 25, 2010), *appeal to Court of Appeals pending*.

[10] *DeGuillen v. Schwan's Food Manufacturing, Inc.*, 38 Kan. App. 2d 747, 754, 72 P.3d 71 (2007); *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 200, 83 P.3d 1239 (2002); *Meyer v. Bombardier/Learjet*, Docket No. 1,015,275, Board decision filed July 10, 2010.

> At the regular hearing, claimant testified he had not looked for work since leaving Labor Ready and was living under a bridge in North Topeka. However, he told Steve Benjamin, a vocational expert, that he had found work in Manhattan working 40 hours a week at $6 per hour.[11]

After the closure of the evidentiary record that formed the factual basis for the original Award, claimant found work. The change in employment status constitutes a change of circumstances. Likewise, the loss of that employment is another change of circumstances. As these changes occurred after the record closed, the respondent's law of the case argument fails because we are no longer concerned with the facts surrounding claimant's employment status as it existed at the time of the submission of the case to the ALJ for decision. Instead, upon review and modification, we are concerned about the subsequent events, in this case claimant's subsequent employment and earnings.

The relevant time period for review and modification is when the change occurred, but no more than six months before the date claimant's application for review and modification was filed. Claimant lost his post award job sometime in May 2009. Claimant's Application for Review and Modification was filed September 17, 2009. Therefore, the May 2009 date is within six months of the filing of claimant's Application for Review and Modification. Claimant testified that he lost his job around the middle of May and that he had back surgery on May 28 or 29, 2009. The ALJ entered his original Award on May 19, 2009. In his Award Upon Review and Modification, the ALJ found the effective date to be May 21, 2009, the day after the effective date of his original Award. The Board agrees with the ALJ's reasoning. Accordingly, the Board will find the effective date for review and modification to be May 21, 2009.

Pursuant to K.S.A. 44-510e, claimant's permanent partial disability is the average of his 100 percent wage loss and his 27.5 percent task loss, which results in a work disability of 63.75 percent. The ALJ's Award Upon Review and Modification is affirmed.

CONCLUSION

There has been a change of circumstances since the evidentiary record was closed for the original Award. Effective May 21, 2009, claimant is entitled to modification of the 10 percent functional impairment award to an award of permanent partial disability compensation based upon a 63.75 percent work disability.

In his March 12, 2010, Award Upon Review and Modification, the ALJ failed to give respondent credit for its payment of the 10 percent functional permanent partial disability. The calculation of the Award Upon Review and Modification will be modified to correct this error.

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[11] ALJ Award (May 19, 2009) at 4.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award Upon Review and Modification of Administrative Law Judge Brad E. Avery dated March 12, 2010, is modified to correct the calculation of the Award Upon Review and Modification but is affirmed in all other aspects.

Claimant is entitled to 13.14 weeks of temporary total disability compensation at the rate of $148.50 per week or $1,951.29, followed by 41.5 weeks of permanent partial disability compensation at the rate of $148.50 per week or $6,162.75 for a 10 percent functional disability. Thereafter, beginning May 21, 2009, claimant is entitled to 223.06 weeks of permanent partial disability compensation at the rate of $148.50 per week or $33,124.41 for a 63.75 percent work disability, making claimant's total award $41,238.45.

As of August 11, 2010, there would be due and owing to the claimant 13.14 weeks of temporary total disability compensation at the rate of $148.50 per week in the sum of $1,951.29 plus 105.50 weeks of permanent partial disability compensation at the rate of $148.50 per week in the sum of $15,666.75 for a total due and owing of $17,618.04, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $23,620.41 shall be paid at the rate of $148.50 per week for 159.06 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of August, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the award of the majority. K.S.A. 44-528 is specific in directing the method of determining whether a modification of an award is proper. The statute requires a determination of an employee's capability to earn equal or greater wages than that being earned at the time of the accident. The Supreme Court, in an opinion which sent shock waves through the workers compensation bar in Kansas, was very specific in *Bergstrom*[12] in determining that the court's obligation is to give effect only to express statutory language, rather than speculating on what the law should or should not be. The Court of Appeals, more recently, when discussing *Bergstrom* in *Tyler*[13], noted that judicial notions regarding the legislature's intent in the enactment of K.S.A. 44-510e(a) are not favored. The court in *Tyler* went on to warn that "[j]udicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."[14]

The judicial intent contained in K.S.A. 44-528 requires a determination as to whether a claimant is capable of earning the same or higher wages as those being earned on the date of accident. Here, claimant has the ability to return to the same accommodated job with respondent, earning the same wages and receiving the same fringe benefits. Additionally, after leaving respondent's employment, claimant obtained another job, painting cars, at a comparable wage to what he was earning with respondent. Claimant only lost that job due to that employer having closed its business. Claimant's earning "capability" has not diminished with regard to his former accommodated job with respondent. Plus he has displayed the ability to earn a comparable wage with other employment. Therefore, claimant should be limited to his functional impairment pursuant to K.S.A. 44-528 and denied additional permanent partial general disability under K.S.A. 44-510e.

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BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

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[12] *Bergstrom, supra.*

[13] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

[14] *Id.* at 391.